IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2006

CORAM

THE HONOURABLE MR.JUSTICE D.MURUGESAN

W.P.Nos.164 and 324 of 2006

M/s Karnataka Commercial & Industrial
Corporation Private Limited
rep. by its Manager
Mr.Syed Sajjad Pasha
No.10, Church Road
Basavanagudi
Bangalore 560 004 .. Petitioner in both the W.Ps.

-Vs-

1. The Airport Authority of India
rep. by its Chairman
Rajiv Gandhi Bhavan
Safadarjung Airport
New Delhi .. R1 in both the Writ Petitions

2. The Airport Director
Airport Authority of India
New Administrative Block
2nd Floor, Chennai Airport
Chennai 600 027 .. R2 in both the Writ Petitions

3. The Assistant General Manager
(Commercial)
Airport Authority of India
New Administrative Block
2nd Floor, Chennai Airport
Chennai 600 027 .. R3 in both the Writ Petitions

4. The Manager Commercial
Airport Authority of India
New Administrative Block
2nd Floor, Chennai Airport
Chennai 600 027 .. R4 in W.P.No. 324 of 2006

W.P.No.164 of 2006 filed under Article 226 of The Constitution of India, praying to issue a Writ of Mandamus, directing the respondents to treat the petitioner as qualified to take part in the further tender process for grant of licence for Management of Airport Entry Ticket at the Chennai Airport under the notice inviting tender issued by the 2nd respondent for a period of 5 years from takeover and on that basis consequently direct the 3rd respondent to

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open and consider the financial bid of the petitioner for the said tender.

W.P.No.324 of 2006 filed under Article 226 of The Constitution of India, praying to issue a Writ of Certiorari, calling for the records of the 4th respondent having reference No.AAM/C-2960/2005/5018 dated 27.12.2005 and quash the same.

For Petitioner :: Mrs.Nalini Chidambaram
Senior Counsel for
M/s Gladys Daniel

For Respondents :: Mr.Vijay Narayan
Senior Counsel for
Mr.R.Parthiban &
Mrs. Narmatha Sampath

ORDER

As the issues involved in both the writ petitions arise under the same tender notification, they are disposed of by this common order.

2. The petitioner-M/s Karnataka Commercial & Industrial Corporation Private Limited is engaged in the business of offering specialized services in the domestic airports. According to the petitioner, for the past 13 years, it has been successfully implementing and managing the issuance of Airport Entry Tickets in the Airports at Delhi, Hyderabad, Chennai, Bangalore, Ahmedabad and Goa. On 1.12.2003 the petitioner was awarded the licence for management of airport entry ticket contract at Chennai Airport for a period of two years and that the petitioner had successfully implemented the contract without any blemish. On 28.11.2005, the Airport Director, Airport Authority of India, Chennai Airport, Chennai, the second respondent issued a notice inviting tender for the grant of licence for the management of airport entry ticket (hereinafter referred to as the "ticket contract") at the Chennai Airport for a period of five years from 1.12.2005 since the existing contract shall expire on 30.11.2005. The eligibility criteria fixed for the bidders was that (a) they should have two years of experience in areas mentioned in the tender; (b) they should have a minimum annual turnover of Rs.4.32 crores and (c) they should produce a solvency certificate from the banker.

3. As per clause 2 of the general information/guidelines (Licence for Management of Airport Entry Ticket at Chennai Airport), the tender application shall be submitted in two sealed envelopes viz., Envelope 'A' containing the 'Technical Bid' along with the relevant/required documents and the Envelope 'B' containing the 'Financial Bid' and both the Envelopes shall be sealed in the 'Master Envelope'. As per clause 3, the Technical Bid shall contain the following basic documents:-

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(i) Details of experience in the trade for which tenderer(s) intend to participate along with supported authenticated documents. Credential certificate issued by the authorities at the place of contracts or clients or bankers in favour of tenderer(s).

(ii) Earnest Money Deposit of Rs.9,34,000/- in the form of Bank Demand Draft/Pay Order in favour of Airport Authority of India, Chennai Airport.

(iii) Tenderer shall quote their Permanent Account Number in their tender along with Affidavit declaring assets and liabilities of the tenderer in case the reserve price for the contract is less than Rs.0.50 lacs per month.

(iv) For the contract carrying reserve price more than Rs.0.50 lacs per month, tenderer(s) should submit the following documents:

Last financial year's filed income tax return including documents, such as:

(a) Profit & Loss Accounts along with the Schedule indicating the breakup of their income from various sources and Balance Sheet.

(b) Assessment Order for last completed assessment. In case no assessment is completed an affidavit to this effect should be furnished.

(c) Tenderer shall quote their Permanent Account Number in their tender.

(d) Attested copies of Memorandum/Articles of Association in case of registered Firm/Cooperative Societies.

(e) Partnership deed in case of partnership firm.

(f) Any other relevant information/document which tenderer(s) may consider appropriate including their expertise and experience in the areas other than for which tenders invited by AAI.

(g) In case of contract carrying Minimum Reserve Licence Fee (MRLF) Rs.12.00 lakhs per annum and above, Solvency Certificate equal to an amount of Security Deposits calculated on MRLF is to be furnished from a Nationalised/scheduled Bank as per enclosed proforma in original.

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As per clause 5 of the above guidelines, if any tender submitted by the tenderer not accompanied by all or any of the documents such

tender will be rejected by the Authority out-rightly. As per clause 6, only on compliance and fulfillment of the above requirements in the Technical Bid, the Financial Bid of the tenderer shall be opened.

4. According to the petitioner, since it had 13 years of experience and had a annual turnover of Rs.8.9 crores, it submitted the tender application offering competitive rates along with the technical bid enclosing the relevant documents and the financial bid along with the demand draft for Rs.9,34,000/= towards EMD and the solvency certificate from the petitioner's banker. On 7.12.2005, the technical bid of the petitioner along with three other bidders was opened by the tender committee. Since the petitioner came to understand that the petitioner was disqualified at the stage of technical bid and the financial bid of the petitioner was not opened and that the financial bids of two other bidders were only opened, the petitioner sent a representation on 28.12.2005 to the second respondent seeking the reasons for not opening the financial bid of the petitioner. As there was no reply, the petitioner filed W.P.No.164 of 2006 seeking for a direction to the respondents to treat the petitioner as qualified to take part in the further tender process for grant of licence for management of airport entry ticket at the Chennai Airport under the notice inviting tender issued by the second respondent for a period of five years from takeover and on that basis to consequently direct the 3rd respondent to open and consider the financial bid of the petitioner.

5. In the meantime, by the proceedings dated 27.12.2005, the Manager Commercial, Airport Authority of India, Chennai Airport rejected the bid of the petitioner on the ground that the petitioner did not comply with the tender conditions by filing the last financial year's income tax return and was not qualified for opening of the financial bid. Hence, the petitioner has questioned the said order in W.P.No.324 of 2006.

6. I have heard Mrs.Nalini Chidambaram, the learned Senior Counsel appearing for the petitioner and Mr.Vijay Narayan, the learned Senior Counsel appearing for the respondent-Airport Authority of India. One of the tenderers by name M/s Vishal Protection Force, Mumbai had filed W.P.M.P.No.919 of 2006 seeking for a direction to implead as the third party in the writ petition. Mr.K.Chandru, the learned Senior Counsel appeared for the third party-petitioner.

7. Mrs.Nalini Chidambaram, the learned Senior Counsel would submit that inasmuch as the petitioner had substantially complied with the conditions contained in the notice inviting tender, the technical bid of the petitioner ought not to have been rejected. She would also submit that clause 5 of the general information/guidelines for submission of tender does not specify that in the absence of filing of Saral form the financial bid should not be opened and the tender rejected. Hence, the impugned order is without any justification. She would further submit that the policy of inviting tender is to ensure that there is transparency in the award of contracts, to encourage more competition and to secure more revenue. By not opening the financial bid of the petitioner, the competition is scuttled. The

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learned Senior Counsel finally would submit that the action of the respondents is mala fide only to show favouritism to the other two tenderers, apart from such action being illegal and arbitrary.

8. Mr.Vijay Narayan, the learned Senior Counsel for the respondents, on the other hand, would submit that the scope of judicial review in the matters of tender is very limited and is available only in case of arbitrariness, unreasonableness and mala fides. In the absence of compliance of the conditions of tender inasmuch as the respondent-Authority is bound to strictly adhere to the conditions of tender, the rejection of tender for the non-compliance of conditions cannot be interfered with by this Court and in such event there is no scope for judicial review.

9. I have considered the respective submissions made by the learned Senior Counsel. The power of judicial review in the matters of tender had come up for consideration before the Apex Court in more than one case. In "Tata Cellular Vs. Union of India (1994 (6) SCC 651)", the Apex Court has laid down the following principles:-

> "(1) The modern trend points to judicial Restraint in administrative action.
>
> (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not such decisions are made qualitatively by experts.
>
> (5) The Government must have freedom of Contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

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In the same judgment, the Apex Court has also laid down two other facets of irrationality, and they are as follows:-

> "(1) It is open to the Court to review the decision-maker's evaluation of the facts. The Court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way cannot be upheld.
>
> (2) A decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes."

10. In "New Horizons Limited Vs. Union of India (1995 (1) SCC 478)", after referring to the decision in Tata Cellular case, the Apex court has held that the Courts cannot review the conditions of tender. It was also held that the State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution, which excludes arbitrariness in State action, and requires the State to act fairly and reasonably. It was further held that the decision of the Court therefore insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant.

11. In "Air India Limited Vs. Cochin International Airport Limited (2000 (2) SCC 617)", the Apex Court has held that while the State can choose its own method in fixing the conditions it should comply with the norms, standard and procedure and the decision should be on the basis of overall view of the transaction after weighing various relevant factors and having regard to commercial viability.

12. In "Associated Provincial Picture Houses Limited Vs. Wednesbury Corporation (1948 (1) KB 223)", the principle known as 'Wednesbury principle of reasonableness' is explained. In that case it was held that a decision of public authority is liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

13. In "Directorate of Education Vs. Educomp Datamatics Ltd. (2004 (4) SCC 19)", the Apex Court has held that the Courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. It was further held that while exercising the power of judicial review of the terms of the tender notice, the Court cannot order change in them.

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14. Recently the Apex Court in the judgment in "Global Energy Ltd. and another Vs. M/s Adani Exports Ltd. and others (AIR 2005 SC 2653)" has held as follows:-

> "The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court."

15. An analysis of the above judgments makes it clear that the Apex Court has consistently held that the scope of judicial review is limited as it extends only to find out as to whether the tender authority had acted arbitrarily in disregard to fairness and reasonableness or the action is discriminatory or actuated by malice, as the terms of the tender are in the realm of contract.

16. Keeping the law laid down by the Apex Court, the facts pleaded in this case shall be considered. The conditions of tender are binding on both the tenderer as well as the authority inviting the tender. According to clause 2 of the general information/guidelines of the tender notice, a tenderer must submit two sealed envelopes relating to the technical bid in envelope 'A' and the financial bid in envelope 'B' and that both the envelopes are to be sealed in the master envelope. Envelope 'A' shall contain the basic documents specified in that clause. The issue relates to non-filing of the last financial year's filed income tax return. The relevant sub-clauses are extracted in the earlier portion of the order. The petitioner had submitted the balance sheet and the other annexures for the year 2005-2006 without the filed income tax return in the prescribed format. As per the second part of clause 3(iv), a tenderer must enclose the last financial year's filed income tax return including the documents mentioned in sub-clauses (a) to (g). There is no dispute that the petitioner did not enclose the filed and verified income tax return in the prescribed format for the last financial year, though it had enclosed other documents including the balance sheet.

17. Section 139 of the Income Tax Act, 1961 contemplates that every person, if his total income … exceeded the maximum amount which is not chargeable to income-tax, shall furnish a return of his income … in the prescribed form and verified in the prescribed manner… Section 140 contemplates that the return under Section 139 shall be signed and verified. In this context the petitioner should also comply with Rule 12(1) of the Income Tax Rules for the income tax return to be valid. What is a valid income tax return came up for consideration before a Division Bench of the Punjab and Haryana High Court in "Commissioner of Income Tax, Jullundur Vs. Dr.Krishan

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Lal Goyal (1984 Vol.148 ITR 283)", wherein the Division Bench has held as follows:-

> "It is manifest from the above-quoted statutory provision that a return, in order to be valid, must comply with the conditions prescribed therein. There is a policy behind the prescription of the requirement of verification of the return. The assessee is enjoined to vouchsafe for the veracity and truth of the facts stated in the return so that the income-tax authorities could proceed to make assessment on the basis of the return. If an assessee conceals particulars of income or deliberately furnishes inaccurate particulars of his income then he is liable to penal action. However, in the absence of a verification, it may not be possible to successfully launch penalty proceedings against a defaulting assessee. For this reason, a return which is not verified is invalid and is no return in the eye of law. There is no provision in the Act permitting an assessee to amend his return. He can only, in certain specified cases, file a fresh return but he cannot add to or delete from the return, already filed. It is not necessary to dilate upon the point, because the matter is not res integra. In Waman Padmanabh Dande v. CIT (1952) 22 ITR 339, a Division Bench of the Nagpur High Court observed (at p.343):
>
> > "Where a return made is not in the prescribed form, or is not signed and verified as required by the prescribed form, it is an invalid return and can be ignored by the Income Tax Officer who can thereupon make an assessment under section 23 (4) of the Act."

18. It is the specific case of the respondents that the petitioner had not furnished the last financial year's filed and verified income tax return in the prescribed format, and the same is also not disputed by the petitioner. However, it is the case of the petitioner that the furnishing of the last financial year's filed income tax return is only a formality and inasmuch as the petitioner had enclosed all other documents as required under the second part of clause 3(iv) of the guidelines, it should be construed that the petitioner had made 'substantial compliance' of the tender conditions. In my opinion, the question of substantial compliance in the matters of tender cannot be accepted in view of the categorical dictum of the Apex Court on the law. For the purpose of opening of the financial bid, the documents which are required for the clearance of the technical bid must have been enclosed for scrutiny as per the tender conditions. In the event

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of failure to enclose all the relevant, required and valid documents as per the conditions of tender, the technical bid is liable to be rejected in terms of clause 5 of the guidelines, whereby a right is given to the authority to reject the tender submitted by the tenderer in case the tender did not accompany all or any of the documents as per the second part of clause 3(iv). In the circumstances, I do not find any merits in the challenge to the impugned order, whereby the technical bid of the petitioner has been rejected on the ground of non-compliance of the tender conditions. On the facts of the given case, I do not find any arbitrary action on the part of the respondents. As the technical bid of the petitioner was not accepted in terms of and for non-compliance of the tender conditions, I find no unreasonableness or arbitrariness in the action of the respondents in rejecting the tender. For the same reasons, the submission as to the mala fide is also liable to be rejected. The decision making process of the respondents cannot be the subject matter of judicial review, as this Court does not act as a Court of appeal to review such decisions, especially in the absence of arbitrariness, unfairness, discrimination and mala fide.

19. Moreover, the fact remains that the financial bids of the other two tenderers were opened on 27.12.2005 and that the petitioner filed W.P.No.164 of 2006 only on 2.1.2006 after the bid amount is made known. In such circumstances, the following observations of the Apex Court made in the Global Energy Ltd. case (supra) shall be kept in mind.

> "Secondly, once the tenders are opened, the relative position of each bidder is known and the appellants would have avoided depositing any earnest money, had they felt that their bid was not competitive and there was no chance of getting the contract....
>
> When after opening the tenders it was revealed that their bid was not competitive and they had no chance of getting the contract they did not at all deposit the earnest money, which was a mandatory condition of NIT."

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20. Much was relied on an order passed by me in W.P.Nos.23950 of 2004 & 10781 of 2005 dated 13.9.2005, by the learned Senior Counsel for the petitioner to canvass the submission that, if substantial compliance is made, the technical bid should not be rejected. The said writ petitions arose under the following circumstances. Ennore Port Limited called for tenders for selection of a developer for design, engineering, financial construction, operation, maintenance and market a common user coal terminal on BOT basis at Ennore Port during October, 2002. Pursuant to the said advertisement, the Ennore Port also issued a request for qualification, shortly known as RFQ. There are two eligibility norms in respect of the minimum eligibility criteria for experience (Technical, Managerial, Operational, Commercial) and

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that the said clause stipulated that the bidding company (or any of its promoters/affiliates/ subsidiaries) or for a Bidding Consortium, any Consortium Member having a minimum stake of 11% in the Bidding Consortium (or any of its promoters/affiliates/ subsidiaries) should meet the following two eligibility criteria for experience and track record specified as on the last date for submission of the Request for Qualification. It is not necessary that both criteria be met by the same entity. Handling experience of at least 2.0 million metric tones per annum of dry cargo in seaport operations in any of the last three financial years. The cargo could include dry bulk, break-bulk or containerized cargo, and that successfully implemented, as an equity investor with not less than a 26% holding, an infrastruture/core sector project of project cost not less than Rs.300 crores. Secondly, in respect of the minimum eligibility criteria for financial capability the clause stipulated that the bidding company or any one of the promoters' or for a Bidding Consortium, the Lead Consortium Member of any one of its Promoters would be evaluated for financial capability specified as on the last date for submission of the Request for Qualification. The petitioner therein was a Consortium and in view of the said clause, the financial capability of the member of the Consortium should be also taken into consideration, as such benefit was given to the bidding company. While considering the application of the clause, I have held as follows:-

> "Based on the law laid down by the Supreme Court this Court would not be within its jurisdiction to review the conditions of tender. However, this Court is competent to go into the question as to whether the conditions have been strictly complied with and applied uniformly and in the said process, there is no arbitrariness and unreasonableness. Insofar as the minimum eligibility criteria for experience in technical, managerial, operational and commercial, the respondent had recognized such experience for a bidding company or any of its promoters/affiliates/ subsidiaries. The same benefit has also been given to the bidding consortium as well whereby the experience of even the consortium member could be taken as the compliance of Clause 7.3. While coming to clause 7.4 as to the minimum eligibility criteria for financial capability, the said clause must be read in conjunction with clause 7.3. Under the said clause, the financial capability of a bidding company or any one of its promoters are accepted for evaluation and on the other hand, it is the case of the respondent that in terms of the 2nd limb of the clause 7.4 only the financial capability of the lead consortium member alone would be taken for evaluation. Whether eligibility norms contained in clause 7.4 as applied in the manner ought to have been applied is the

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> further question for consideration. A perusal of the said clause, in my opinion, shows that in the case of evaluation of financial capability of bidding consortium, not only financial capability of lead consortium member would be taken but also the financial capability of any one of its promoters also can be taken into consideration. Of course, this clause is sought to be clarified in letter dated 28.11.2002 by fixing the financial para meter of Rs.150 crores net worth, Rs.300 crores of net tangible assets and Rs.25 crores as bridge financing capability. There is no change in the clause 7.4 of the tender documents and Clause 1.4 of the said letter is only a clarification without affecting the condition in Clause 7.4."

21. The above judgment was rendered on the facts of that case as to the application of the benefits given to the bidding company shall also be extended to the bidding Consortium as per the terms and conditions of the tender. The said judgment is not applicable to the facts of this case. Hence, I do not find any merit in the said submission of the learned Senior Counsel for the petitioner.

22. For all the above reasons, the challenge to the impugned proceedings is unsustainable. Accordingly, both the writ petitions are dismissed. No costs. Consequently, W.P.M.P.Nos.216, 381 & 382 of 2006 are also dismissed.

23. In view of the dismissal of the writ petitions, the implead petition in W.P.M.P.No.919 of 2006 is dismissed as unnecessary.

ss

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Chairman
   Airport Authority of India
   Rajiv Gandhi Bhavan
   Safadarjung Airport
   New Delhi

2. The Director
   Airport Authority of India
   New Administrative Block
   2nd Floor, Chennai Airport
   Chennai 600 027

3. The Assistant General Manager(Commercial)
   Airport Authority of India
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4. The Manager (Commercial)
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+ 1 cc to M/s. Gladys Danial, Advocate SR No.2619
+ 1 cc to Mr.R.S.Kirubakaran, Advocate SR No.2506
+ 1 cc to Mr.R. Parthiban, Advocate SR No.2555

PV(CO)
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Order in

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